



## INTERIOR BOARD OF INDIAN APPEALS

Miller Exploration Company v. Rocky Mountain Regional Director,  
Bureau of Indian Affairs

37 IBIA 114 (01/25/2002)



## United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS  
INTERIOR BOARD OF INDIAN APPEALS  
4015 WILSON BOULEVARD  
ARLINGTON, VA 22203

MILLER EXPLORATION COMPANY,  
Appellant

v.

ROCKY MOUNTAIN REGIONAL  
DIRECTOR, BUREAU OF INDIAN  
AFFAIRS,  
Appellee

: Order Vacating Decision  
: and Remanding Case  
:  
:  
: Docket No. IBIA 01-39-A  
:  
:  
: January 25, 2002

This is an appeal from a September 14, 2000, decision of the Rocky Mountain Regional Director, Bureau of Indian Affairs (Regional Director; BIA), cancelling an Oil and Gas Exploration and Development Agreement (Agreement) between Miller Exploration Company (Miller) and the Blackfeet Tribe (Tribe). For the reasons discussed below, the Board vacates the Regional Director's decision and remands this matter for such further action as may be necessary following the completion of arbitration.

The Agreement was entered into under authority of the Indian Mineral Development Act (IMDA), 25 U.S.C. §§ 2101-2108, on February 19, 1999, and approved by the Regional Director on February 26, 1999. It is identified in BIA records as Contract No. IMDA 99 14-20-0251-7498.

Article 5 of the Agreement required Miller to pay \$1,000,000 upon approval of the Agreement by BIA, \$525,000 on or before the second anniversary date of the Agreement, and \$525,000 on or before the third anniversary date of the Agreement. Article 6 required Miller to drill at least two wells during each of the first five years of the Agreement.

Miller paid \$1,000,000 on or before May 28, 1999. However, because of difficulties in negotiating with K2 America Corporation (which held another IMDA agreement with the Tribe, as well as an agreement with Miller), Miller concluded that it would be unable to fulfill its first-year drilling obligation. Miller states in this appeal that it had reached that conclusion by August 1999, when it first sought an extension from the Tribe under Article 22 of the

Agreement, FORCE MAJEURE. <sup>1/</sup> Miller further states that the Chairman of the Tribal Land Board responded at that time that the request was “too early.”

On January 5, 2000, representatives of Miller and the Tribe met to discuss the extension request. In a January 14, 2000, letter to the Tribe, Miller requested an extension until October 1, 2000, and explained what it planned to do during the extension period. It stated that it would need a partner and noted that it had not yet resolved its differences with K2 America Corporation.

The Tribal Land Board Chairman responded on February 7, 2000, requesting that Miller provide a full explanation of what it had done until then to fulfill its obligations under the Agreement. He stated that, once the information had been received, he would present Miller's request for extension to the Tribal Land Board and the Blackfeet Tribal Business Council (BTBC). Miller responded on February 18, 2000.

On March 2, 2000, the Tribal Land Board Chairman wrote to Miller, paraphrasing a provision in Article 6 of the Agreement and stating:

This will be final notification that [Miller] has five (5) business days to comply with [the Agreement]. After the fifth working day if [Miller] fails to comply with the terms of [the Agreement, Miller] will immediately surrender and relinquish all Subject Lands outside of the spacing units established for any producing or capable of producing wells that were drilled and completed prior to the failure of [Miller] to timely comply with the well obligations.

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<sup>1/</sup> Article 22 provides:

“FORCE MAJEURE. If [Miller] is prevented from, or delayed in commencing, continuing or resuming operations, or complying with its express or implied obligations hereunder, by circumstances that are not reasonably within [Miller's] control, this Exploration and development Agreement shall not terminate or be forfeited and [Miller] shall not be liable in damages so long as such circumstances continue. These circumstances include, but are not limited to the following: earthquake, storm, flood or other act of God, fire, war, rebellion, insurrection, riots, strikes or failure of carriers to transport or furnish facilities for transportation, or orders, rules, or regulations of any federal, state or governmental agency, including the Blackfeet Tribe.

\* \* \* If [Miller] is prevented from, or delayed in commencing, continuing or resuming operations, or complying with its expressed or implied obligations hereunder for any other reason than referenced above, the Tribe and [Miller] agree to negotiate in good faith for an extension of time, not to exceed one (1) year, to allow [Miller] to meet its drilling obligations. [Miller] shall not make requests for any unreasonable extensions of time and the Tribe shall not unreasonably withhold its consent for an extension. Provided however, that valuable consideration shall be paid to the Tribe for any extension of time which is granted pursuant to this paragraph.”

Miller responded on March 10, 2000, expressing shock and dismay at the Tribe's action and referring to the provision in Article 22 under which the Tribe is precluded from unreasonably withholding its consent to an extension. Miller continued:

[The Tribe's] unreasonable withholding of its consent for an extension of the drilling deadline has been a material breach of its obligations under [the Agreement] and has excused [Miller] from further performance of its obligations. Your letter dated March 2, 2000 is a repudiation of [the Agreement].

In response to your repudiation of [the Agreement, Miller] rescinds [the Agreement] and demands immediate return of the \$1,000,000 paid to date, plus damages yet to be calculated. If you concur, please advise us. Otherwise, we understand that [Article] 12 of [the Agreement] requires us to negotiate this controversy before commencing arbitration. Please contact us to begin the negotiations.

Miller's Mar. 10, 2000, Letter at 2.

On March 21, 2000, the Regional Director wrote to Miller, citing 25 C.F.R. § 225.36, 2/ stating that Miller had failed to comply with the drilling and payment requirements of the Agreement, and further stating: "You are hereby notified you have 30 days from receipt of this letter to provide written notice as to why you have not complied with the agreement."

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2/ 25 C.F.R. § 225.36 provides in part:

"(a) If the Secretary determines that an operator has failed to comply with the regulations in this part; other applicable laws or regulations; the terms of the minerals agreement; the requirements of an approved exploration, drilling or mining plan; Secretarial orders; or the orders of the Authorized Officer, the Director's Representative, or the [Minerals Management Service] Official, the Secretary may:

"(1) Serve a notice of noncompliance; or

"(2) Serve a notice of proposed cancellation.

"(b) The notice of noncompliance shall specify in what respect the operator has failed to comply with the requirements referenced in paragraph (a), and shall specify what actions, if any, must be taken to correct the noncompliance.

"(c) The notice of proposed cancellation shall set forth the reasons why cancellation is proposed.

\* \* \* \* \*

"(e) The operator shall have thirty (30) days (or such longer time as specified in the notice) from the date that the Bureau of Indian Affairs notice of proposed cancellation or noncompliance is served to respond, in writing, to the Superintendent or [Regional] Director actually issuing the notice."

Miller's President responded by letter dated April 10, 2000, enclosing copies of most of its correspondence with the Tribe and stating: "I feel these letters will sufficiently document why [Miller] has not drilled the referenced wells and made the referenced payments."

On April 13, 2000, the Tribal Land Board Chairman responded to Miller's March 10, 2000, letter. He stated in part:

[Miller] had one year to commence operations for two wells under [Article] (6) of [the Agreement. Miller] failed to do anything that could be viewed as "commencing operations" for those two wells. \* \* \*

Under these circumstances, our invoking the 5-day cancellation provision in [the Agreement], as my March 2nd letter did, is justified. While the BTBC agrees with you that [the Agreement] is terminated, we do not agree that there is anything to arbitrate. There will be no extension of the Agreement.

Tribal Land Board Chairman's Apr. 13, 2000, Letter at 1.

On May 1, 2000, Miller wrote to the Tribe, demanding arbitration under Article 12 of the Agreement. Miller renewed its demand on May 25, 2000, stating that it would take all steps necessary to enforce its right to arbitration.

On May 17, 2000, the BTBC enacted Resolution 157-2000, which states in part: "Miller is prohibited from conducting further business on the Blackfeet Indian Reservation as Miller has failed to obtain a business license as instructed and required." The resolution also rescinded an earlier resolution in which the BTBC had authorized K2 America Corporation to assign a 50% interest in its IMDA agreement to Miller.

On September 14, 2000, the Regional Director wrote to Miller, cancelling the Agreement. He gave as reasons for cancellation Miller's failure to make a \$525,000 payment on or before February 26, 2000, and Miller's failure to complete its first-year drilling obligation. He stated:

My cancellation of this agreement is in conformity with federal laws, rules and regulations and is not subject to arbitration as identified in [Article] 12 [of the Agreement,] GOVERNING LAW, ARBITRATION AND WAIVER OF SOVEREIGN IMMUNITY. This is not a controversy between you and the Blackfeet Tribe; you have failed to meet your contractual obligations with the United States.

Regional Director's Decision at 2.

The Regional Director's decision included incorrect appeal instructions, stating that any appeal was to be filed with the Assistant Secretary - Indian Affairs. On November 13, 2000, the Regional Director amended his decision to correct the appeal instructions. Miller then filed a notice of appeal with the Board.

Briefs have been filed by Miller and the Regional Director. <sup>3/</sup> Although advised of its right to participate in this appeal, the Tribe has not done so.

Miller makes three principal arguments: (1) The Agreement requires that this dispute be resolved through arbitration; (2) Miller's \$525,000 payment was not due on February 26, 2000, as the Regional Director held, but, rather, on February 26, 2001, which was the "second anniversary date"; and (3) Miller's business difficulties fell within the force majeure provisions of Article 22, and the Tribe was in breach of the Agreement by unreasonably withholding its consent to an extension under Article 22.

In response to Miller's first argument, the Regional Director contends that the Agreement was terminated by the parties prior to the time Miller invoked the arbitration clause—an action which, according to the Regional Director, Miller did not take until May 1, 2000. As evidence of the Agreement's prior termination, the Regional Director cites the Tribe's March 2, 2000, letter; Miller's March 10, 2000, letter; and the Tribe's April 13, 2000, letter. Although contending that there was "a mutual meeting of the minds concerning the termination" (Regional Director's Brief at 3), the Regional Director also suggests that the Tribe's action was sufficient to terminate the Agreement unilaterally. Citing the Board's decisions in Franks v. Acting Assistant Secretary--Indian Affairs (Operations), 13 IBIA 231 (1985), and Kosechata v. Acting Anadarko Area Director, 33 IBIA 198 (1999), the Regional Director argues that Miller's request for arbitration was untimely. <sup>4/</sup>

Miller contends that the provision of the Agreement relied on by the Tribe in its March 2, 2000, letter is not a termination provision, as the Regional Director argues, but a forfeiture provision. Further, Miller contends that it invoked the arbitration clause of the Agreement in its March 10, 2000, letter and that there was no meeting of the minds concerning termination of the Agreement.

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<sup>3/</sup> In its opening brief, Miller stated that it had filed suit in the United States District Court for the District of Montana, seeking to compel the Tribe to arbitrate. In an October 2001 status report, Miller stated that the case was still pending.

<sup>4/</sup> In Franks, the Board held that arbitration under a lease of Indian land must be requested before the lease is cancelled. The Board followed that holding in Kosechata.

The provision relied on by the Tribe in its March 2, 2000, letter is part of Article 6, EXPLORATION PHASE/EARNING WELLS, which sets out Miller's drilling obligations. The next-to-last paragraph of that Article states:

In the event [Miller] does not timely comply with the above referenced well obligations, within five (5) business days of receipt of written notification from the Blackfeet Tribe of [Miller's] failure to comply, [Miller] will immediately surrender and relinquish all of the Subject Lands outside of the spacing units established for any producing or capable of producing wells that were drilled and completed prior to the failure of [Miller] to timely comply with the well obligations.

The language of this provision supports Miller's argument that it is a forfeiture provision, rather than one providing for termination of the Agreement. The Tribe's March 2, 2000, letter simply paraphrases the provision and does not attempt to characterize it. There is no specific indication in the letter that the Tribe considered its action to be a cancellation or termination of the Agreement.

Miller's March 10, 2000, letter describes the Tribe's March 2, 2000, letter as a "repudiation" of the Agreement. It then states that Miller "rescinds" the Agreement. If Miller's letter had ended there, it could well be argued that Miller considered the Agreement terminated. The remainder of the letter, however, shows that Miller considered the Agreement to be still in effect. In particular, Miller stated that it sought to negotiate and then arbitrate under Article 12.

The Tribe's April 13, 2000, letter indicates that, by that date, the Tribe had come to view its March 2, 2000, letter as a cancellation or termination of the Agreement.

The Board finds that (1) whatever the Tribe's intent may have been on March 2, 2000, it failed at that time to express a clear intent to terminate the Agreement; (2) Miller's March 10, 2000, letter did not express an understanding of, or consent to, an immediate termination of the Agreement; and (3) Miller never acquiesced in the Tribe's April 13, 2000, characterization of its March 2, 2000, letter as a cancellation of the Agreement.

Accordingly, the Board rejects the Regional Director's contention that the three letters show a meeting of the minds to terminate the Agreement. The Board also rejects the Regional Director's suggestion that the Tribe might have terminated the Agreement unilaterally. For the reasons discussed above, the Tribe's March 2, 2000, letter cannot reasonably be construed as a cancellation letter, despite the Tribe's later characterization of it as such. Even assuming the

Tribe has unilateral cancellation authority under the Agreement, it failed to exercise that authority in a clear and unequivocal manner. <sup>5/</sup>

Miller first informed the Tribe of its wish to invoke the arbitration clause on March 10, 2000. On May 1, 2000, it made a formal demand for arbitration. The Board finds that, on both of these dates, the Agreement was still in effect. Accordingly, the Board's holding in Franks does not control here.

The Board most recently addressed the issue of arbitration in Buena Vista Homes, Inc. v. Acting Pacific Regional Director, 36 IBIA 194, recon. denied, 36 IBIA 257 (2001). In that decision, the Board reviewed and reaffirmed the principles developed in earlier Board decisions on the subject. In briefest summary, the Board's practice has been to enforce arbitration clauses in Indian leases and contracts in accord with the apparent intent of the parties. Thus the Board has enforced arbitration clauses where three conditions are met: (1) the dispute at issue falls under the arbitration clause; (2) arbitration is timely requested; and (3) the arbitration clause makes arbitration mandatory, rather than permissive.

Article 12 of the Agreement provides:

GOVERNING LAW, ARBITRATION AND WAIVER OF SOVEREIGN IMMUNITY. \* \* \* Any controversy that cannot be resolved between the parties in the normal course of their negotiations shall be settled by binding arbitration utilizing a three member arbitration panel. \* \* \* The majority decision of an arbitration panel shall be binding upon the parties, and the parties agree that the decision of the arbitration panel may be judicially enforced in the United States District Court for the District of Montana. The Blackfeet Tribe shall waive its sovereign immunity from suit to permit arbitration and judicial enforcement of any arbitration panel's decision. With regard to any waiver of such sovereign immunity the Blackfeet Tribe agrees to pledge, if applicable, only those assets contained in or subject to the Agreement as to enforcement of any judgment obtained pursuant to the Agreement.

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<sup>5/</sup> The Board finds no provision in the Agreement which sets out a specific procedure for unilateral cancellation or termination of the Agreement. However, Article 21, TERM, provides: "Subject to the terms, covenants and conditions set forth on Exhibit 'B' attached hereto [a form lease], this Agreement shall remain in full force and effect for so long as [Miller] is in full compliance with the terms, covenants and conditions set forth herein." This language suggests the possibility that the Agreement might expire by its own terms upon the failure of Miller to comply with the Agreement. However, the Tribe did not rely on this provision in its letters to Miller, and no one argues in this appeal that an automatic expiration occurred. Under these circumstances, and given the uncertainty as to when, if at all, an expiration might occur under Article 21, the Board does not address the question of expiration.



This provision is broadly worded. It does not restrict the kinds of controversies that are subject to arbitration. Nor does it limit the time for invoking arbitration. Further, the language of the provision is mandatory, not permissive. The Board concludes that Article 12 covers the dispute at issue here, that it allows a party to invoke arbitration at any time during the term of the Agreement, and that it requires the parties to arbitrate their disputes so long as arbitration is timely requested.

As discussed above, the Board has concluded that the Agreement was still in effect when Miller sought arbitration. Therefore, the Regional Director September 14, 2000, decision must be vacated in order to allow arbitration to proceed.

Following completion of arbitration, the Regional Director may again take action, if appropriate. The relevant regulation clearly appears to allow for independent action by BIA. 6/ See also, with respect to BIA's role following arbitration, Buena Vista Homes, 36 IBIA at 200; Swinomish Tribal Community v. Portland Area Director, 30 IBIA 13 (1996).

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Regional Director's September 14, 2000, decision is vacated, and this matter is remanded to him. 7/ The Regional Director shall await completion of arbitration proceedings, and any judicial review thereof, before taking any further action in this matter.

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//original signed  
Anita Vogt  
Administrative Judge

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//original signed  
Kathryn A. Lynn  
Chief Administrative Judge

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6/ 25 C.F.R. § 225.25 provides:

“A minerals agreement shall contain provisions for resolving disputes that may arise between the parties. However, no such provision shall limit the Secretary's authority or ability to ensure that the rights of an Indian mineral owner are protected in the event of a violation of the provisions of the minerals agreement by any other party to the minerals agreement.”

7/ This disposition makes it unnecessary to reach Miller's other arguments.